Supreme Court, U. S.
FILED
OCT 24 1975
MICHAEL RODAK, JR., CLERK

No. 75-474

In the

Supreme Court of the United States

OCTOBER TERM, 1975

STATE BOARD OF ELECTIONS FOR THE STATE OF ILLINOIS, and MICHAEL L. LAVELLE, DONALD W. ADAMS, FRANKLIN LUNDING, JR., and WILLIAM L. HARRIS, individually and as members of the State Board of Elections,

Petitioners,

vs.

COMMUNIST PARTY OF ILLINOIS, ISHMAEL FLORY, LORRAINE ASHBY, JOHN LUMPKIN, JAY SCHAFFNER, VALERIE WITZKOWSKI; and THEODORE PEARSON, individually and on behalf of others similarly situated,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether *Moore* v. *Ogilvie,* 394 U.S. 814, is dispositive of the unconstitutionality, for violation of the "one man, one vote" principle, of a state election law which requires nominating petitions of "new" party candidates for statewide office to be signed by 25,000 voters, of whom not more than 13,000 from the same county may be counted.

STATEMENT OF THE CASE

Petitioners—Communist Party of Illinois, an unincorporated association, its candidates, and a voter wishing to vote for them—sought to nominate candidates for state-wide offices in 1972, and again in the 1974 elections out of which this controversy arose. In both years, it was required by section 10-2 of the Illinois Election Code, Ill. Rev. Stat., Ch. 46, to secure petition signatures to qualify for the placement of its candidates on the ballot. This requirement flowed from the fact that it was a "new" political party as defined by section 10-2, having failed to secure at least 5% of the vote in the preceding election.

In 1974, the Party secured approximately 30,000 signatures, well in excess of the 25,000 required by section 10-2. But that section further provides that not more than 13,000 signatures from any one county will be counted. Respondents therefore ignored all of the Party's Cook County signatures in excess of 13,000 and denied it and its candidates a place on the ballot for failure to meet the multi-county signature requirement.

When confronted with a like rejection of its nominating petitions in 1972, the Party sought and obtained an order from a three-judge district court declaring section 10-2 unconstitutional for violation of the "one man, one vote" principle and granting a preliminary injunction against its enforcement. *Communist Party* v. *Ogilvie,* 357 F. Supp. 105 (N.D. Ill. 1972); Pet. Br., p. C1. The State did not appeal this decision.

Following rejection of the Party's 1974 petition, respondents again sought and obtained injunctive and declaratory relief. The Court of Appeals affirmed, concluding with the District Court that section 10-2 violates the equal protection and due process clauses of the Fourteenth Amendment.

REASONS FOR DENYING THE WRIT

Certiorari should be denied because the decision below is in accord with controlling decisions of this Court invalidating statutory schemes which disqualify voters from participating in the process of nominating by petition minor party or independent candidates for state-wide office solely because of the county of their residence within the state. *Moore* v. *Ogilvie, supra* (1969); *Rockefeller* v. *Socialist Workers Party,* 400 U.S. 806 (1970), aff'ing *Socialist Workers Party* v. *Rockefeller,* 314 F. Supp. 984 (S.D. N.Y. 1970). These decisions, in turn, simply represent the application to the nominating process for such candidates of the "one man, one vote" requirement which *Gray* v. *Sanders,* 372 U.S. 368 (1962) applied to primaries for the nomination of major party candidates.

Petitioners do not ask for reconsideration of the rule of *Moore* and *Rockefeller*. They argue (Pet. Br., p. 12) only that the statutes there involved are distinguishable from section 10-2. That argument was considered and laid to rest by the Court of Appeals. As its opinion states (Pet. Br., pp. A8-A9):

> "Section 10-2 suffers the same constitutional defect (as its predecessor did in *Moore, supra*). To paraphrase the Supreme Court in *Moore*: Under section 10-2 the entire electorate of Cook County, which represents 45% of all registered voters in Illinois, may not form a new political party and place its candidates on the ballot. Yet any 25,000 of the remaining 55% of registered voters properly distributed among the

> remaining 101 counties may form a new party to elect candidates to office. Put another way, the approximately 2,750,000 registered Illinois voters in urbanized Cook County do not have the power under section 10-2 to create a statewide political party to protect their own peculiar interests, while 25,000 voters in any two or more counties in rural downstate Illinois may create such a party to protect their distinctly different, and often competing interests. This two-county requirement, like the fifty county requirement in *Moore,* "discriminates against the residents of the populous counties of the state in favor of rural sections."

Indeed, it appears that in 1972 the State acquiesced in the conclusion that section 10-2 is unconstitutional under *Moore.* For it did not appeal the three-judge court decision in *Communist Party* v. *Ogilvie, supra,* which so held. Its belated change of heart is not warranted by decisions of this or any other court.

In holding the "one man, one vote" principle applicable to party primaries, *Gray* v. *Sanders, supra,* at 379, made it clear that in every aspect of the electoral process:

> once the geographical unit for which a representative is to be chosen is designated (and here that unit is the state, for the offices at issue are statewide ones), all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their income, and wherever their home may be in the geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment.

Under *Gray,* the Court would obviously not countenance a primary law which denied nomination to the state-wide candidate who received a majority of the votes cast, when more than 52% of his votes came from one county. No

more will it countenance section 10-2, which applies a like formula (13,000 signatures, which equals 52% of the requisite 25,000) to the nominating petitions of minor party candidates.

The hard statistical facts are that section 10-2 makes residence the critical criterion in determining whether a voter shall be given a voice in nominating "new" party candidates. One million voters in Cook County or 100,000 in Lake County (which has no major urban area) could sign the petition of the candidate whom they see as the man for the times and for the state. But only 13,000 of these signatures would be counted, the remainder being treated as non-existent. These voters would be dependent upon the voters of at least one other county to supply the 12,000 deficiency, or their man would be denied a place on the ballot.

There can be no compelling state interest (*Williams* v. *Rhodes,* 393 U.S. 23, 31 (1969)) in this crass violation of equal protection, and petitioners point to none. They attempt to justify section 10-2 on two grounds.

First, they offer the hypothetical danger (Pet. Br., p. 16) that "Without some regulation, Chicago fringe candidates would have the power to flood the statewide ballot in every election." Their hypothesis is at odds with the facts. For three million suburban voters reside in Cook County with interests often at odds with those of Chicago residents. They, too—and not just Chicagoans—are denied an equal voice in the nominating process, as are the residents of every other county. Moreover, even if it could be shown that candidates selected by Cook County voters act adversely to the interests of downstate residents (a showing totally unsupported by petitioners), that showing could not by any stretch justify the denial

to such voters of an equal voice in the nominating process. "'Fencing out' from the franchise a sector of the population because of the way they vote is constitutionally impermissible." *Carrington* v. *Rash,* 380 U.S. 89, 94 (1965). Accord, *Dunn* v. *Blumstein,* 405 U.S. 330, 355-56 (1971).

Second, petitioners argue (Pet. Br., p. 8) that section 10-2 is needed "to screen out the frivolous and nuisance candidacies." But section 10-2 was designed in a manner that "screens out" candidates whose massive support, although confined to a single county, refutes any such characterization. Moreover, as the Court of Appeals observed (Pet. Br., p. A11), if there is a compelling state interest in avoiding "laundry list" ballots, "some method is surely available which will serve the interest without making the effectiveness of an Illinois citizen's electoral power depend on his geographical location within that state." Obviously, section 10-2 is "insufficiently 'tailored' to achieve the articulated state goal." *Dunn* v. *Blumstein, supra,* at 357.[1]

Petitioners' contention that *Moore* is not dispositive of the unconstitutionality of section 10-2 in its present form has been rejected by a three-judge court, a single judge district court and the Court of Appeals for the Seventh Circuit. As appears from what has been said here, their

[1] Petitioners assert (Pet. Br., p. 14) that "there is not a scintilla of evidence in the record that the signature distribution requirement has prevented a legitimate, new statewide political party from obtaining ballot position . . ." This assertion is contrary to fact. In both 1972 and 1974 the Communist Party obtained well over 25,000 signatures but had its petitions rejected by the state authorities because of its inability to satisfy the multi-county signature requirement. In consequence, it would not have appeared on the ballot in either year but for the intervention of the district court.

conclusion is unassailable. Other federal courts have examined a variety of similar statutes and invalidated them on the basis of *Moore.*[2] Accordingly, there is no occasion for review by the Court.

[2] *Socialist Workers Party* v. *Hare,* 304 F. Supp. 534 (E.D. Mich. 1969); *Baird* v. *Davoren,* 346 F. Supp. 515 (D. Mass. 1972); *Socialist Labor Party* v. *Rhodes,* 318 F. Supp. 1262 (S.D. Ohio 1970), appeal dismissed on other grnds. sub nom *Socialist Labor Party* v. *Gilligan,* 406 U.S. 583 (1972). Petitioners' reliance (Pet. Br., pp. 18-20) on *Zautra* v. *Miller,* 348 F. Supp. 847 (D. Utah 1972) is misplaced for three reasons: 1) The court erroneously employed the rational basis rather than the compelling state interest test. 2) The court held Utah's multi-county signature requirement (500 with 10 from each of 10 counties) *de minimis,* particularly in the light of plaintiffs' admission that they could have complied with it. 3) As the court found, Utah offers an alternative route to the ballot by independent petitions which require only 300 signatures with no geographical distribution. In Illinois, on the contrary, the signature and multi-county requirements for independent petitions are identical with those for "new" parties. Illinois Election Code, Ill. Rev. Stat., Ch. 46, section 10-3.

CONCLUSION

Certiorari should be denied.

Respectfully submitted,

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